Indeed, BellSouth's argument here epitomizes bad faith. The Commission's rule requiring ILECs to combine elements at the request of CLECs was based on the "practical difficulties" the Commission foresaw in requiring new entrants themselves to do such work directly on the incumbents' facilities. See Local Competition Order ¶ 294. When BellSouth and other incumbent LECs challenged these rules, the Commission and CLECs "argue[d] that because the incumbent LECs maintain control over their networks it is necessary to force them to combine the network elements," for presumably "the incumbent LECs would prefer to do the combining themselves to prevent the competing carriers from interfering with their networks." Iowa Utils. Bd., 120 F.3d at 813. BellSouth and the other large LECs never advised the Eighth Circuit that they would be unwilling to provide such direct access, and that Court upheld their challenge to those rules in part on the ground that "the fact that the incumbent LECs object to this rule indicates to us that they would rather allow entrants access to their networks than have to rebundle the unbundled elements for them." Id.

To date, BellSouth has refused even to consider other alternatives -- for both manually and electronically recombining elements -- that would comply with the Eighth Circuit's ruling concerning direct access. Indeed, there appear to be several alternatives that -- while still imposing significant disadvantages on a CLEC's ability to compete -- nevertheless may avoid some of the worst excesses that are inherently a part of collocation. Falcone/Lesher Aff. ¶¶ 97-122. Many of these alternatives -- such as allowing recombination at the MDF (see id. at ¶¶ 99-107) -- do not require CLECs to provide their own facilities, and at least one method, involving electronic recombination through existing switch intelligence and the ILECs' "recent change" process, appears more promising than any method of manual recombination. Id. ¶¶ 118-122. There is no reason today arbitrarily to cut off investigation of such alternatives. To the

contrary, the Commission should make clear BellSouth's collocation requirement does not comply with its obligation to provide nondiscriminatory access to UNEs in a manner that enables them to be combined. The Commission should also clarify that other approaches -- involving both electronic as well as other manual methods of combination -- must be pursued and be made available.

3. BellSouth's Argument That The Takings Clause Requires CLECs To Combine Elements In Collocated Space Is Frivolous

BellSouth does not attempt to defend its collocation requirement as a reasonable means of opening local markets to competition through the use of network elements. It contends, rather, that CLECs are stuck with this grossly inefficient and unusable method because that is all that Congress authorized. In BellSouth's view, any form of CLEC access to its network other than through collocation -- such as, for example, permitting CLEC technicians to enter its central office to reconnect directly the connections that BellSouth would sever -- (1) would constitute a "permanent physical occupation" and thus a "physical taking" under Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), and (2) is not expressly authorized by the 1996 Act and thus, under Bell Atlantic Tel. Co. v. FCC, 24 F.3d 1441 (D.C. Cir. 1994), is beyond the Commission's authority to order. This claim is frivolous. Indeed, each premise is demonstrably false.

First, in contrast to the physical collocation that was required by the rules in Bell Atlantic, the temporary access to BellSouth's network that will be necessary to repair its vandalizing of its own facilities manifestly will not constitute a "permanent physical occupation." In one alternative, for example, an ILEC-certified frame technician jointly retained by the ILEC and CLEC would arrive, disconnect and reconnect the facilities, and then leave. See Falcone/Lesher Aff. ¶¶ 104-105. BellSouth would be left with nothing more on its property

than the same BellSouth facilities as existed before, with no remaining presence by CLEC personnel or CLEC facilities.[11] Loretto carefully, and repeatedly, distinguished between a "permanent physical occupation" and a "temporary invasion," and "[a] taking has always been found only in the former situation." Loretto, 458 U.S. at 428.[12] Because the holding of Bell Atlantic applies only where there is "'an identifiable class'" of cases in which the agency's rule "'will necessarily constitute a taking'" (Bell Atlantic, 24 F.3d at 1445 (emphasis added) (citation omitted)), the fact that CLECs' temporary access for reconnection purposes will not "necessarily constitute a taking" itself disposes of BellSouth's theory.

Second, quite apart from BellSouth's mistaken premise that any CLEC entry onto ILEC premises for the purpose of combining elements involves a taking, BellSouth also errs in asserting that the "only statutory authorization for" such entry is the "collocation provision of section 251(c)(6)." Br. 48-49. By its plain terms, section 251(c)(3) provides such authorization. This provision does not merely require ILECs generally to provide connections; it requires that they provide access "at any technically feasible point." That language expressly and unequivocally forecloses BellSouth's claim that it may limit the point of access to one point of its own choosing (collocation cages). Indeed, several of the Commission's rules implementing

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[11] BellSouth does not claim that, because those BellSouth facilities will then be leased by the CLEC, they become the CLEC's facilities such that their mere continued presence in BellSouth's central office constitutes an unauthorized taking. Nor could it. Even if the leasing of those facilities constituted a taking (as it does not), that "taking" would be expressly authorized by Section 251(c)(3), and BellSouth would receive full and just compensation under the pricing standards of Sections 251(c)(3) and 252(d)(1).

[12] See also id. at 430 (distinguishing a "permanent physical occupation" from "a physical invasion short of an occupation"); id. at 434 ("underscor[ing] the constitutional distinction between a permanent occupation and a temporary physical invasion"); id. at 435 n.12 ("[t]he permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude").

this requirement -- most of which BellSouth did not even challenge before the Eighth Circuit -- explicitly establish that ILECs may not make collocation the only method of access to network elements.[13] Thus, even if CLEC entry into the premises of an incumbent constituted a taking, which it does not, section 251(c)(3) provides the "clear warrant" for such action that the D.C. Circuit has required. See Bell Atlantic, 24 F.3d at 1446.

B. BellSouth Neither Provides Nor Has Made Available Unbundled Local Switching

Regardless of how the loop and switch are combined, BellSouth has not yet developed the capabilities to provision switching and other elements on a nondiscriminatory basis. See § 271(c)(2)(B)(ii), (vi); 47 C.F.R. § 51.319(c). In particular, BellSouth is unable to provide CLECs with the usage and billing data they need to bill for access services or for reciprocal compensation. In addition, BellSouth is unable to provide full access to the vertical features of the switch. Finally, BellSouth remains unable to provide customized routing to AT&T's operator services and directory assistance centers, and further compounds this failure by refusing to unbrand the operator services and directory assistance that it resells to AT&T.

1. **Billing For Access Services:** The Act unequivocally imposes upon BellSouth the duty to provide AT&T with access to unbundled network elements "for the provision of a

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[13] See, e.g., 47 C.F.R. § 51.5 (requiring incumbent LECs to provide "collocation, and other methods of achieving interconnection or access to unbundled network elements" and stating that "a point in the network[] shall be deemed technically feasible absent technical or operational concerns that prevent the fulfillment of a request by a telecommunications carrier for such interconnection, access, or methods") (emphasis added); 47 C.F.R. § 51.321(a) ("incumbent LEC shall provide . . . any technically feasible method of obtaining . . . access to unbundled network elements at a particular point") (emphasis added); Local Competition Order, ¶ 549 (the duty to interconnect at any technically feasible point is not limited "to a specific method of interconnection or access to unbundled [network] elements"). See also Iowa Utils. Bd., 120 F.3d at 810 (upholding Commission definition of "technically feasible").

telecommunications service" such as exchange access. § 251(c)(3). The Commission's rules also establish that incumbent LECs must permit CLECs to use unbundled network elements to provide exchange access services. 47 C.F.R. §§ 51.307(c), 51.309(b). Of course, as the Commission has further recognized, an essential aspect of providing exchange access services is billing interexchange carriers for that service. See Local Competition Order ¶ 363 n.772 ("where new entrants purchase access to unbundled network elements to provide exchange access services . . . the new entrants may assess exchange access charges to IXCs originating or terminating toll calls on those elements."). And, in the face of BOC resistance, the Commission has twice reaffirmed these rules. See Order on Reconsideration ¶ 11 ("a carrier that purchases the unbundled local switching element . . . obtains the exclusive right to provide . . . exchange access . . . for that end user");[14] Third Order on Reconsideration ¶ 38 ("where a requesting carrier provides interstate exchange access services to customers, to whom it also provides local exchange service, the requesting carrier is entitled to assess originating and terminating access charges to interexchange carriers, and it is not obligated to pay access charges to the incumbent LEC").[15]

Despite this clear obligation, BellSouth remains unwilling and unable to provide CLECs with the information they need to bill IXCs for exchange access services. To begin with, BellSouth categorically refuses to provide CLECs with the information they would need to bill

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[14] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket Nos. 96-98 et al., Order on Reconsideration, FCC 96-394 (rel. Sept. 27, 1996) ("Order on Reconsideration").

[15] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket Nos. 96-98 et al., Third Report and Order on Reconsideration and Further Notice of Proposed Rulemaking, FCC 97-295 (rel. Aug. 18, 1997) ("Third Order on Reconsideration").

IXCs for intrastate access charges. See Tamplin Aff. ¶ 18 (citing BellSouth correspondence on this point). But nothing in the Act, the Commission's rules, or any judicial decision limits the exchange access services (or any telecommunications services) that new entrants can provide to purely interstate access. To the contrary, the Act broadly defines "telecommunications service" (which new entrants are entitled to use UNEs to provide, see §§ 3(46), 251(c)(3)), and the Commission's rules and orders, cited above, are similarly all-encompassing.[16] There is certainly no jurisdictional basis for the distinction, because even BellSouth concedes that unbundled network elements may be used to provide purely local telephone exchange service. It simply makes no sense to say, as BellSouth has, that a new entrant is entitled to use unbundled network elements to provide purely local service and purely interstate access service, but not intrastate access.

BellSouth concedes that it has an obligation to provide appropriate billing and usage data to allow CLECs to bill IXCs for providing interstate access services (at least in Kentucky). But even that concession may be more apparent than real. BellSouth has long maintained -- and sought to enforce through its SGAT -- a rule that CLECs that use unbundled network elements to provide an end user with service that duplicates an existing BellSouth retail service will not be entitled to collect exchange access charges from IXCs who originate or terminate toll calls involving that customer. Tamplin Aff. ¶¶ 14-17.

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[16] The Commission's recent Texas Preemption Order assumed that new entrants using UNEs would be able to collect intrastate access charges. See In the matter of the Public Utility Commission of Texas, CCBPol 96-13, et seq., Memorandum Opinion and Order, FCC 97-346, ¶ 210 n.482 (rel. October 1, 1997) ("Texas Preemption Order") ("[T]he application of intrastate access charges to intrastate toll traffic carried over unbundled network elements would appear to raise significant issues under section 253 if the charges for unbundled network elements reflect unseparated costs.").

The LPSC has enthusiastically endorsed BellSouth's position, asserting that "AT&T will be deemed to be 'recombining unbundled elements to create services identical to BellSouth retail offerings' when the service[s] offered by AT&T contain the functions, features and attributes of a retail offering that is the subject of a properly filed and approved BellSouth tariff."[17] Under this view, while AT&T would not be deemed to be providing services that duplicate BellSouth services if AT&T uses "its own switching or other substantive functionality in combination with unbundled elements," providing "functions or capabilities such as operator services, Caller ID, [or] Call Waiting are not sufficient to distinguish AT&T's services. Id. Given this broad definition, virtually any service that AT&T or any CLEC offered would be deemed by BellSouth and the Louisiana commission to "duplicate" an existing BellSouth service, thereby eliminating, as a practical matter, any new entrant's ability to use unbundled network elements to provide exchange access services in Louisiana.[18]

In a letter to AT&T dated September 12, 1997, BellSouth once again stated its view that it will provide access billing information only "in instances where the use of unbundled network elements is not duplicating an existing BellSouth service." Letter from Mark Feidler (BellSouth) to William J. Carroll (AT&T) at 4 (Sept. 12, 1997) (see Tamplin Aff. Att. 2). Thus, the degree -- if any -- to which BellSouth will permit new entrants using unbundled network elements to collect interstate access charges is uncertain.

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[17] In the Matter of Interconnection Agreement Negotiations Between AT&T Communications of the South Central States, Inc. and BellSouth Telecommunications, Inc., Docket U-22145, Order U-22145, at 40 (LPSC Jan. 15, 1997)("LPSC AT&T Arbitration Order").

[18] BellSouth certainly has not denied that it considers any CLEC service provided using UNEs to "duplicate" BellSouth's service unless the CLEC uses either its own loop or its own switch. Tamplin Aff. ¶ 16.

Even assuming, however, that BellSouth is willing to provide CLECs with the necessary information, it is evident that BellSouth has not yet developed the capability to do so. BellSouth's contrary assertions are misleading. See Br. 55. BellSouth's witness William N. Stacy admits that BellSouth has not yet completed the enhancements to its Daily Usage File for CLECs that will be necessary for BellSouth to transmit access charge records to CLECs electronically. BellSouth Stacy OSS Aff. ¶ 106 (BellSouth's Daily Usage File for CLECs "does not currently contain the usage data which would allow a CLEC to bill an interexchange carrier for the provision of access"). Although BellSouth provides no estimate as to when the necessary enhancements to the Daily Usage File might be completed, BellSouth suggests that in the meantime it would be willing to produce access records in "paper form." However, BellSouth has made no showing that, regardless of the "form" of transmission, it can even record or otherwise calculate the necessary network element usage. Moreover, "paper" records are certainly not equivalent to the form in which BellSouth accesses the billing data for its own purposes, and it is wholly unacceptable for commercial use even as an interim measure. Mr. Feidler's letter of September 12 acknowledges the need for BellSouth and AT&T "to work through industry fora to reach agreement on standards for record exchange and meet point billing." Until the parties agree on these basic issues, and until BellSouth develops and deploys some appropriate arrangement to apportion switching usage data by carrier and by line for each CLEC, BellSouth will not be in a position legitimately to offer to provide the necessary access data. Tamplin Aff. ¶¶ 21-27.

In short, BellSouth is even further behind than was Ameritech in developing the capability to provide access billing information. Cf. Ameritech Michigan Order ¶ 330.

Accordingly, BellSouth has failed to make unbundled switching available for use in providing exchange access services.

2. **Billing For Reciprocal Compensation:** Having taken the position that CLECs who provide service using unbundled network elements are not entitled to collect reciprocal compensation from other carriers, BellSouth also has not developed the ability to provide new entrants with the billing and usage data needed to bill and collect such compensation from other carriers for terminating local calls (absent bill and keep arrangements). Tamplin Aff. ¶ 28. Historically, there was no need for BellSouth to capture such information on calls between end offices within its network, and BellSouth has neither asserted nor demonstrated that it has developed the ability to measure, record and process terminating usage data for local calls to CLEC customers served with unbundled local switching purchased from BellSouth. Id. ¶¶ 28-35. In this way, too, it has failed to make the unbundled local switching fully available to new entrants.

3. **Restrictions On The Use Of Vertical Features:** BellSouth further imposes unlawful restrictions on access to unbundled local switching by denying access to vertical features except as they are being used in existing BellSouth services. On its face, BellSouth's SGAT purports to "offer all the functionality of its switches." SGAT VI.A. But in practice, that offer is limited to features and functions as BellSouth currently provides them in its retail services.

This was confirmed when AT&T recently sent two preliminary test orders in Kentucky for customers to be served with unbundled network elements. One order sought to add a new service, "Call Hold." The other sought to add "900 number blocking." BellSouth initially refused to process these orders, explaining that neither service was available individually but had

to be ordered as part of an existing BellSouth retail package of services. See Tamplin Aff. ¶¶ 41-46 & Att. 9-13. More recently, BellSouth confirmed its position that it is currently unable to provide CLECs with access to vertical features other than as they currently are packaged in BellSouth's retail offerings, but offered to "work" on purported "technical limitations" in its switch needed to fix this problem. Id. ¶¶ 44-45. BellSouth's own correspondence makes clear, however, that line class codes can be used to provide 900 blocking apart from other features, and BellSouth has not identified any technical reason why Call Hold could not also be made separately available. See id. & Att. 12.

4. **Customized Routing:** BellSouth also has failed to make available yet another important switch capability -- customized routing. Local Competition Order ¶ 412. Customized routing to AT&T's OS/DA centers is particularly important to AT&T, because AT&T believes its OS/DA centers are a valuable asset that will play an important role in AT&T's effort to offer customers a superior service. Accordingly, since March, 1997, when AT&T began preparing for market entry in Georgia, AT&T has sought to have BellSouth route the operator and directory assistance calls of AT&T customers to AT&T's operator services and directory assistance centers. Tamplin Aff. ¶ 48.

BellSouth agrees that AT&T's preferred solution for customized routing, involving use of Advanced Intelligent Network (AIN) architecture, is technically feasible, but admits that its AIN solution for customized routing will not be available until the second or third quarter of 1998. Id. ¶ 59. Of course, a promise of future implementation is inadequate for demonstrating checklist compliance. In the interim, BellSouth claims that customized routing is available today using line class codes. SGAT VI.A.2; Varner Aff. ¶ 118. But AT&T's experience demonstrates that this is not true. Even after more than seven months of attempted

implementation, AT&T's customers in Georgia still receive their OS/DA services via resale from BellSouth. Tamplin Aff. ¶¶ 47-51. Moreover, BellSouth has suggested that, once it is able to provide customized routing; it may be able to convert no more than 100 existing AT&T resale customers to customized routing per business day -- thus guaranteeing that it would still take many months before BellSouth could actually make customized routing available to all of AT&T's eligible customers. Id. ¶ 54.

5. **Refusal to Unbrand:** BellSouth has exacerbated the anticompetitive effect of its inability to provide customized routing by insisting -- starting back in April, 1997 -- on branding all of its OS/DA services, including that which it resells to new entrants such as AT&T. Thus, not only is AT&T unable to provide its customers the benefit of AT&T's OS/DA services, it must accept that every time its customers need OS/DA they receive what amounts to an AT&T-subsidized commercial for BellSouth. As the Commission has recognized, this is anticompetitive. See Local Competition Order ¶ 971 ("[B]rand identification is critical to reseller attempts to compete with incumbent LECs and will minimize consumer confusion. Incumbent LECs are advantaged when reseller end-users are advised that the service is being provided by the reseller's primary competitor.").

BellSouth could and should solve this problem in an instant -- by simply disabling the branding of its services until such time as it truly is able to make selective routing available. Tamplin Aff. ¶ 68. This Commission has stated that "a providing LEC's failure to comply with the reasonable, technically feasible request of a competing provider for the providing LEC to rebrand . . . in the competing provider's name, or to remove the providing LEC's brand name, creates a presumption that the providing LEC is unlawfully restricting access . . . by competing providers" to OS/DA in violation of the section 251(b)(3) of the Act. Local Competition Second

Report and Order ¶¶ 128, 148;[19] see Local Competition Order ¶ 971. And last December the Georgia Commission specifically ordered BellSouth to "'revert to generic branding for all local exchange service providers, including itself'" in the event it could not provide branding for AT&T customers. Tamplin Aff. ¶ 59 (quoting Georgia arbitration order). BellSouth, however, is refusing to comply with the Georgia Commission's order. Id. ¶¶ 60-66.[20] In these circumstances, BellSouth's refusal to suspend the branding of its service confirms the Commission's "presumption" that BellSouth is unlawfully refusing to provide nondiscriminatory access to OS/DA in violation of sections 251(b)(3) and 271(c)(2)(B)(xii).

C. BellSouth Has Failed To Demonstrate That It Is Offering To Provide Unbundled Network Elements At Cost-Based Rates

BellSouth also fails to demonstrate that UNEs are available in Louisiana at cost-based rates. BellSouth argues first (Br. 40-41) that the rates recently approved by the LPSC are in fact cost-based. As discussed further below and in the affidavit of Mr. Gregory R. Follensbee, that argument is irreconcilable with the record before this Commission. That record demonstrates that BellSouth's cost studies had an admitted embedded-network and embedded-cost focus, and that -- due to time constraints -- the Commission staff and its consultant used those cost studies as a default, making only limited adjustments to certain improper generic inputs, such as annual cost factors and labor rates. While these adjustments produced some reductions in BellSouth's proposed rates, they did not begin to address the myriad flawed assumptions that infected

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[19] In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 et al., Second Report and Order, FCC 96-333 (August 8, 1996) ("Local Competition Second Report and Order").

[20] AT&T has filed a complaint with the Georgia Commission today which includes, among other things, a complaint that BellSouth has not complied with that Commission's order requiring unbranding of OS/DA calls.

virtually every aspect of BellSouth's many cost studies, which is why the ALJ that heard the testimony and reviewed the evidence concluded that additional proceedings were needed to set cost-based rates. By relying solely on BellSouth's studies, only partially corrected by a staff consultant, the LPSC affixed a "cost-based" label to scores of prices that bear no relation to forward-looking costs.

In the alternative, BellSouth argues (Br. 41-42) that the LPSC's decision -- no matter how arbitrary it may be -- is "conclusive" as a matter of law, and that this Commission has no authority even under section 271 to evaluate whether BellSouth's UNE-access and interconnection rates are cost-based. This argument, too, lacks merit.

1. BellSouth's Rates, Which Are Based On BellSouth's Embedded Cost Studies, Do Not Comply With The Requirement That Rates Reflect Forward-Looking Costs

On pricing as on all other checklist issues, the "BOC applicant retains at all times the ultimate burden of proof that its application satisfies section 271." See Ameritech Michigan Order ¶¶ 44, 49, 291; Local Competition Order ¶ 680. Given the obvious defects in the record, BellSouth has not begun to meet its burden.

a. BellSouth's Cost Studies Improperly Reflected Embedded Costs.

As a precondition to providing interLATA services in Louisiana, BellSouth must provide interconnection and unbundled network elements at rates that are "just, reasonable and nondiscriminatory," § 251(c)(2), and "based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable)," § 252(d)(1)(A)(i); see § 271(c)(2)(B)(i), (ii). In its Local Competition Order, this Commission implemented these provisions by adopting the forward-looking, total element long run incremental cost ("TELRIC") methodology for calculating

network element costs. Local Competition Order ¶¶ 690-93. Thus, the Commission found that the appropriate rate for a network element is the forward-looking least cost of efficiently providing it. The Commission found that, in contrast, rates that recover embedded or opportunity costs do not comply with the Act. Id. ¶¶ 704-11.

Nevertheless, the rates adopted in the LPSC Pricing Order, and on which BellSouth relies in this application, are derived from BellSouth cost studies that reflect BellSouth's embedded-network and that are designed to recover embedded costs.[21] Although BellSouth nominally referred to these cost studies as forward-looking, it made no serious attempt to conceal their true nature. Contending that this Commission's pricing standards are not controlling and conceding that its cost studies complied with those standards only "to some [unspecified] extent," BellSouth argued that "it should be allowed to recover its actual, or embedded, costs." See Final Recommendation, Docket Number U-22022/22093 at 15, 18 (October 17, 1997) ("Final Recommendation"). BellSouth's pricing witness, Mr. Alphonso Varner, testified that BellSouth's revised cost studies included all of BellSouth's actual costs, including historic or embedded costs and costs reflecting existing network architecture. Varner Reb. Test. at 3-5 (Tab 265/2); Varner Tr. at 43, 91 (Tab 265). In a quixotic attempt to square its embedded-cost goals with forward-looking cost principles, BellSouth maintained that "it has performed studies in accordance with the forward-looking methodology mandated by this Commission and by the FCC, but that it has done so in a manner that will allow it to recover its actual costs." Final Recommendation at 18 (emphasis added); see generally Follensbee Aff. ¶¶ 11-17.

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[21] These four hundred recurring and nonrecurring charges are set forth in BellSouth's Louisiana SGAT, as approved by LPSC Order No. U-22022/22093-A (consolidated), decided October 22, 1997 ("LPSC Pricing Order").

BellSouth's admitted use of an embedded "lens" distorted every aspect of its cost studies. With respect to general methodology, for example, BellSouth's view was that "the TSLRIC definition, which provides that 'TSLRIC is based on the least cost, most efficient technology that is capable of being implemented at the time the decision to provide the service is made,' directs an analysis of available technology as of the date BellSouth placed equipment into service and not as of the date of the cost studies." Id. at 19 (emphasis added). Compare id. with Local Competition Order ¶ 683 ("[f]orward-looking cost methodologies, like TELRIC, are intended to consider the costs that a carrier would incur in the future") (emphasis added). Similarly, BellSouth refused to base its cost proposals on a "hypothetical" network because "prices based upon such costing methods will be below BellSouth's costs to provide interconnection and unbundled elements." Final Recommendation at 18 (emphasis added).

In short, every aspect of BellSouth's cost studies suffered from assumptions based on embedded cost, historical network design, and other fatal flaws. As a result, those studies produced extraordinarily high "costs." For example, for the loop and port alone BellSouth sought more than $37 in fixed monthly recurring charges -- with only partial vertical-feature functionality. Follensbee Aff. ¶ 17. This $37 excludes the enormous nonrecurring, collocation, and other charges that BellSouth would assess to make those elements "operational." Id. But BellSouth did not stop there. Because its embedded cost approach to "forward-looking" costing did not quite push rates over the embedded cost finish line, BellSouth simply added another $3 that BellSouth labeled a "residual recovery requirement," providing further proof that BellSouth's prices are designed to recover its embedded costs. Id. In sum, the label "forward-looking" costs used by BellSouth is just that -- a label completely lacking in substance.

b. The LPSC's Consultant Acknowledged That She Lacked Sufficient Time To Analyze Most Of BellSouth's Rates

Nonetheless, the rates approved by the LPSC were produced from those flawed BellSouth cost studies, with only limited adjustments to certain of those studies inputs by the LPSC's cost consultant, Ms. Kimberly Dismukes. Ms. Dismukes could do no more than that, because the "revised" BellSouth cost studies at issue were not even produced to Ms. Dismukes (and other parties) until July 11, 1997, (in a pricing docket that had long been dormant at BellSouth's request). Barely two weeks later, the LPSC suddenly ordered that review of the new studies, opening and rebuttal testimony, hearings, briefing and the ALJ's final recommendations all be completed in time for the LPSC's October 22, 1997 meeting at which it would conduct its final review of BellSouth's 271 application. Follensbee Aff. ¶ 10. And at least one of BellSouth's many studies -- for vertical features -- was not submitted until September. Id. ¶ 4, 41-42.

The difficulty of analyzing and making changes to BellSouth's numerous studies in such a short time was compounded by the fact that the studies were separate and unlinked and, in many cases, not susceptible to adjustment. For example, users, including the LPSC staff witness could not change many of the thousands of assumptions in BellSouth's cost studies. Id. ¶ 9 (citing Dismukes Test., App. C, Tab 273/1).

The combination of the highly compressed time schedule and the non-adjustable nature of BellSouth's studies precluded commenting parties -- including the LPSC staff's own consultant -- from completing their work. As the LPSC Staff counsel (on whose behalf Ms. Dismukes presented her testimony) frankly acknowledged:

> "[W]e spent more time on certain issues and less time on other issues and where we did not spend a significant amount of time, the staff used BellSouth's numbers as default, meaning we didn't say they were good or we didn't say they were bad. We just said,

> we don't have time to do an in depth analysis of what these numbers are. We're going to go with them."

Transcript of LPSC, October 22, 1997 Open Session at 87 (App. D Tab 2). Indeed, Ms. Dismukes was unable to review the costs for numerous significant elements, including collocation, directory assistance, poles and conduits, AIN and number portability. See Follensbee Aff. ¶¶ 22-24. Rather, she focused almost entirely on inputs like annual charge factors and labor rates. Id. ¶ 22. Although her adjustments to these "generic" inputs produced some (10-30 percent) reductions to the exorbitant rates proposed by BellSouth, Ms. Dismukes simply did not have time to address the equally important -- and equally defective -- assumptions specific to the individual BellSouth cost studies. Id. at ¶¶ 22-25.

Even in the few instances in which Ms. Dismukes attempted to make adjustments, those adjustments were, for lack of time, arbitrary or concededly incomplete. Id. ¶¶ 25-29. Four notable examples are the rates for vertical features, loops, collocation, and non-recurring costs.

With respect to vertical features, BellSouth's SGAT imposes a recurring charge for the switch port of more than $10 -- eight times higher than the port rates approved by other state commissions -- based upon cost studies submitted at the eleventh hour. See id. ¶¶ 4, 41-42. This extraordinary sum reflects a surcharge for the use of vertical features, which is improper because the ILEC incurs no cost in providing those features since they are part of the processor functionality that the ILEC obtains -- and pays for -- when it purchases the switch. See id. ¶¶ 4, 16, 40-43; Final Recommendation at 50; cf. First Order on Reconsideration, FCC CC Docket No. 96-98 (September 27, 1996) ¶ 8.

While acknowledging that BellSouth's study contained "inherent flaws,"[22] Ms. Dismukes stated that she was able to perform only a "limited review" of BellSouth's "poorly documented" and tardily submitted study. Dismukes Test., App. C Tab 273/1, at 44. Consequently, she "[e]ssentially . . . accept[ed] BellSouth's numbers," (id. at 3115), reducing the proposed charge only by a mere 16 percent, but noting that if she had more time she would seek "additional discovery" and analyze the study "more thoroughly," which might produce "a radically different number." Id. at 3111-13. See Follensbee Aff. ¶¶ 29, 40-47.

In addition, Ms. Dismukes was unable to address the numerous embedded-cost assumptions that infected BellSouth's proposed loop rates (see id. at ¶¶ 32-34), and also left undisturbed BellSouth's refusal to deaverage its loop rates (id. at ¶¶ 22, 35-39). Thus, BellSouth's state-approved loop rates are not deaveraged, in direct contravention of this Commission's finding that the Act mandates that "rates for interconnection and unbundled elements must be geographically deaveraged." Local Competition Order at ¶ 764; see also Ameritech Michigan Order ¶ 292 (deaveraging is essential "to account for the different costs of building and maintaining networks in different geographic areas of varying population density.").

Furthermore, Ms. Dismukes did not address any of the specific evidence or assumptions upon which BellSouth's collocation rates are based. These costs -- even more important now in light of BellSouth's new insistence that CLECs must obtain collocated space in order to gain access to the loop and switching elements -- are grossly inflated and concededly not forward-

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[22] Ms. Dismukes conceded that it was "not necessarily clear precisely what those costs are that are entering in to the [BellSouth vertical features] model," and properly questioned, for example, why, as BellSouth assumed, "additional land or costs would be required if all you are doing is providing features from the switch." Dismukes Test. (App. C Tab 273) at 3111-12 (emphasis added). For these reasons, she concluded that the LPSC could not rely on the BellSouth study due to its "inherent flaws." App. C Tab 273/1 at 44.

looking, because BellSouth took the position that cost-based pricing does not "apply to collocation." See Final Recommendation (Tab 284) at 53; compare Local Competition Order ¶ 629 ("because section 251(c)(6) requires that incumbent LECs provide physical collocation on 'rates, terms and conditions that are just, reasonable and nondiscriminatory,' which is identical to the standard for interconnection and unbundled elements in sections 251(c)(2) and (c)(3), collocation should be subject to the same pricing rules"). Thus, BellSouth's collocation rates -- as well as many others[23] -- are indisputably not cost-based.

c. The ALJ Rejected BellSouth's Position On Virtually Every Pricing Issue

On October 17, 1997, the ALJ issued a Final Recommendation to the LPSC. In her 65-page point-by-point analysis the ALJ flatly rejected BellSouth's position on virtually every costing and pricing issue.[24] With respect to vertical features, for example, the ALJ noted that the schedule had "allowed very little opportunity for the Commission Staff witness to analyze the underlying cost data," and thus recommended "that further proceedings be undertaken with

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[23] Follensbee Aff. ¶¶ 31-63. For example, with regard to non-recurring costs, BellSouth's studies assumed that fully 20% of CLEC service orders, would have to be handled by costly manual, rather than by efficient flow-through electronic, processes. That assumption flies in the face of ILEC claims that they have only 1-2% fallout (to manual processes) with their existing systems, and produces non-recurring "cost" -- and hence rates -- unrelated to forward-looking costs. Nonetheless, BellSouth's 20% assumption apparently carried through to the approved rates; although Ms. Dismukes initially proposed an arbitrary "split the difference" reduction of 10%, the LPSC staff subsequently represented that they were "going with BellSouth's" numbers. See id. ¶¶ 53-58.

[24] See, e.g., Final Recommendation at 26 ("we reject the use of statewide average rates"); id. at 55 ("[w]e conclude that rates for collocation are subject to the same pricing standards applicable to interconnection and unbundling"); id. at 57 ("We concur . . . that forward-looking costs should not reflect a company's [embedded] facilities costs"); id. at 58 n.94 ("We specifically reject BellSouth's argument that the TSLRIC definition . . . directs an analysis of the technology available at the time BellSouth placed individual facilities or equipment into service as opposed to the date of the cost studies").

regard to pricing of vertical features" with opportunities "to conduct discovery concerning BellSouth's underlying cost data." Final Recommendation (Tab 284) at 52.

Overall, the ALJ recommended that BellSouth revise its tariff both to reflect certain limited adjustments that Ms. Dismukes proposed with respect to the few aspects of the BellSouth cost studies that she was able to review, and to make clear that many of the tariffed rates based on BellSouth's cost studies, even as revised, were to serve as interim rates only, subject to revision upon determinations of permanent, cost-based rates. See id. at 56-64; Follensbee Aff. ¶ 18.

d. The LPSC, Without Explanation, Ignored The ALJ's Recommendation

Five days later, the LPSC, in a ruling subsequently reflected in its five-page order (of which all but one paragraph is devoted to procedural background), scrapped the ALJ's recommendations in their entirety. In its place, the LPSC simply approved as "cost-based" the four hundred recurring and non-recurring charges proposed by BellSouth, with only the limited adjustments to those charges proposed by Ms. Dismukes. LPSC Pricing Order at 4.

As the foregoing makes plain, there is no support in the record for any such conclusion. The adjustments that Ms. Dismukes was able to make were a step in the right direction, but as she, the staff, and the ALJ all recognized, the work of establishing cost-based rates in Louisiana has only begun. An SGAT that, inter alia, is derived from studies of embedded cost, that contains excessive and wholly non-cost based charges for vertical features and collocation, that fails to deaverage loop rates, simply does not comply with sections 251 and 252.

2. The Commission Has Clear Authority Under Section 271 To Determine Checklist Compliance, Including Requirements Governing Pricing

BellSouth further argues that, in light of the Eighth Circuit's decision in Iowa Utils. Bd., the Commission has no authority even under section 271 to evaluate whether BellSouth's UNE-access and interconnection rates are cost-based. BellSouth Br. 37. In BellSouth's view, even for checklist purposes, the Commission must entirely defer to the LPSC's findings, which it terms "conclusive." Id. at 41. This argument also lacks merit.

The Eighth Circuit concluded only that the Commission lacked jurisdiction to adopt rules under § 251(c) that would bind states in conducting the interconnection arbitration proceedings for which the Act makes them responsible, in the first instance, under section 252. See Iowa Utils. Bd., 120 F.3d at 793-94. In the Eighth Circuit's view, a uniform interpretation of the federal pricing requirements will come, if ever, only after Supreme Court review of federal court challenges to the individual state decisions under section 252. In the meantime, however, nothing in the Eighth Circuit's decision strips the Commission of its jurisdiction or obligation to enforce these pricing provisions in proceedings -- such as those involving section 271 -- for which the Act grants the Commission exclusive jurisdiction.[25]

Indeed, section 271 grants the Commission exclusive and ultimate authority to determine compliance with each item of the competitive checklist, including proof that UNEs are provided "in accordance with the requirements of § 251(c)(3) and § 252(d)(i)." § 271(c)(2)(B)(ii). Notably, although section 271 places an obligation upon the Commission to "consult" with the

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[25] The Act also grants the Commission authority to enforce the pricing requirements in arbitration proceedings where the state declines to carry out its role, thus further confirming that Congress granted the Commission authority to apply its interpretation of the Act's pricing requirements in the proceedings over which it was given authority. See 47 U.S.C. § 252(e)(5).

state commission on checklist compliance (§ 271(d)(2)(B)), and to "give substantial weight" to the evaluation of the Department of Justice (§ 271(d)(2)(A)), it leaves the ultimate decision whether to "find[]" compliance with respect to "all of the items" solely in the hands of the Commission. § 271(d)(3). Far from requiring the Commission to defer to a state's determination of checklist compliance, these provisions confirm that the Act requires the Commission independently to make findings concerning checklist compliance, including with respect to the Act's pricing requirements. The Commission thus correctly held in its Ameritech Michigan Order that it must continue independently to assess compliance with the Act's pricing provisions, (id. ¶¶ 285-86), and that "a BOC cannot be deemed in compliance with . . . the competitive checklist unless the BOC demonstrates that prices for . . . unbundled network elements . . . are based on forward-looking economic costs." Id. ¶ 289. This holding is controlling here.

D. BellSouth Does Not Offer Nondiscriminatory Access To Its Operations Support Systems

As the Commission has recognized, no BOC's local monopoly can be broken unless and until that BOC can "switch over customers as soon as the new entrants win them" -- and can do so regardless of whether that entrant has chosen to compete through "construction of new facilities, purchase of unbundled elements," or "resale" of the BOC's services. Ameritech Michigan Order ¶ 21. For this reason, this Commission has repeatedly emphasized the core requirement that new entrants have "the same access to the BOCs' operations support systems

that the BOCs or their affiliates enjoy." Id.[26] Absent such proof, "entry into the local telecommunications market" simply is not "truly available." Id.

To determine whether nondiscriminatory access is truly available to a BOC's OSS, the Commission has set forth a "two-part inquiry." Id. ¶ 136. First, the Commission will determine whether the BOC has "deployed" the kind of systems capable of providing nondiscriminatory access and has given new entrants the "assistance" and information they need "to understand how to implement and use" those systems. Id.; see id. ¶ 137. Second, the Commission will examine the quantitative and qualitative evidence available concerning the testing and "actual commercial usage" of the BOC's interfaces to determine whether, in fact, new entrants are receiving (or could promptly obtain upon request) nondiscriminatory access to each OSS function (preordering, ordering/provisioning, maintenance/repair, billing) for each method of market entry (facilities, UNEs, resale). Id. ¶ 138; see id. ¶¶ 139-43. Notably, the Commission gave explicit and detailed guidance as to the quantitative evidence of performance that must accompany a serious application under section 271. Id. ¶ 212; see Pfau Aff. ¶¶ 10-16 and Att. 1 (identifying the required performance data).

Before summarizing the evidence appended to AT&T's comments that demonstrates that BellSouth has failed to satisfy the Commission's requirements, it is important to note that several state commissions, as well as the Department of Justice, have each recently reached the same conclusion. In particular, the Alabama PSC has concluded that it would be "premature" to approve BellSouth's Alabama SGAT, in significant part because "BellSouth's OSS interfaces

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[26] See, e.g., Ameritech Michigan Order ¶¶ 130, 132, 135, 137, 139, 143; Local Competition Order ¶¶ 518, 519, 521, 523; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket 96-98, Second Order on Reconsideration, FCC 96-976 (rel. Dec. 13, 1996), ¶ 9, ¶ 11 & n.32 ("Second Order on Reconsideration").

must be further revised to provide nondiscriminatory access to BellSouth's OSS systems" and "to establish performance standards . . . so that BellSouth's provisioning of service to its competitors can be meaningfully compared to BellSouth's internal performance." Alabama PSC SGAT Order at 7-8. Similarly, the Georgia PSC decided not to approve BellSouth's revised Georgia SGAT but merely to let it take effect, and did so "especially in view of the additional development needed for such [checklist] items as OSS electronic interfaces and performance standards," the successful completion of which "will be critical to any future endorsement of in-region interLATA entry by BellSouth."[27]

In addition, the Florida PSC has now affirmed, with minor modifications, the detailed recommendation of its staff that BellSouth be found not to meet its OSS checklist obligations, and that catalogues in significant detail many of the principal defects with BellSouth's OSS access both for unbundled network elements and for resale.[28] The Department of Justice's Evaluation of BellSouth's South Carolina application, in turn, built upon not only the views and work of the Alabama, Georgia, and Florida commissions, but upon all of the comments and evidence submitted in the South Carolina proceeding. Following the Commission's two-part inquiry, but focusing only upon pre-ordering and ordering functions, the Department of Justice concluded that BellSouth had failed to demonstrate nondiscriminatory access to its OSS in numerous respects. DOJ South Carolina Eval. at 25-31 and App. A at A-8 to A-30.

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[27] Georgia Public Service Commission, Interim Order Regarding Revised Statement, In re: BellSouth Telecommunications, Inc.'s Revised Statement of Generally Available Terms and Conditions Under Section 252(f) of the Telecommunications Act of 1996, Docket No. 7253-U, Order at 4 (Oct. 30, 1997).

[28] Florida PSC Order at 98 ("In summary, we find that the interfaces and processes offered by BellSouth do not permit an ALEC to perform an OSS function in substantially the same time and manner as BellSouth performs the functions for itself.")

The conclusions of DOJ and the state commissions are each fully supported by the evidence AT&T presents herein. This evidence shows that the interfaces BellSouth has thus far deployed are inherently incapable of providing new entrants with nondiscriminatory access to most OSS functions. Moreover, BellSouth has failed to provide CLECs with the specifications, business rules, training, and other assistance needed to make even these limited interim interfaces operate efficiently. Similarly, BellSouth has not provided most of the performance data the Commission requires, and what little it has submitted confirm that BellSouth is providing new entrants with grossly inferior service.

1. BellSouth Has Not Deployed Interfaces Capable Of Providing Nondiscriminatory Access

a. Resale: BellSouth has not yet deployed interfaces that are capable of providing equivalent access to the OSS functions of pre-ordering, ordering and provisioning, billing, or repair and maintenance. Each of its interim interfaces have inherent limitations that even under optimal operating circumstances would place the CLEC at a distinct competitive disadvantage as against BellSouth.

i. Pre-ordering: The only interface that BellSouth has currently made available for pre-ordering is a web-based proprietary system called Local Exchange Navigation System (LENS). LENS is inherently incapable of satisfying BellSouth's obligations, for two reasons. First, because LENS is not designed to be a machine-to-machine application, CLEC customer representatives must manually type in all of the pre-ordering information twice -- once into LENS, and a second time into the CLECs' system -- for any given preordering transaction. This dual data entry significantly increases the expense of preordering and the risk of error. These are costs that BellSouth does not bear and that make a web-based interface inherently